

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-04(CH)

April 30, 2010

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Quality Committee's Report on Common Casehandling Deficiencies
Uncovered in FY 2009 Quality Review Process

One of the General Counsel's top priorities is that case processing in the Field be conducted consistent with the highest quality standards. Pursuant to this goal, the Field Quality Committee was formed in FY 2004 and continues to assess the quality of casehandling work in the Field and make recommendations based upon its findings.

The Committee, composed of 9 Field managers and 3 representatives of the Division of Operations-Management, recently completed a careful review of issues identified in case processing during the FY 2009 quality review process. The Committee produced the attached report, which outlines the top ten ways to avoid common casehandling problems, discusses an ethics concern uncovered during the FY 2009 quality reviews, and develops some recommended solutions to avoid other casehandling issues. The report also includes a summary of all of the problems outlined in the FY 2009 quality reviews.

I urge all Regional managers and supervisors to review the Committee's report and make this report the subject of an upcoming staff meeting. I want to take this opportunity to thank the twelve members of the Quality Committee for their excellent work on this important project.

/s/
R.M.

Attachment

cc: NLRBU
Release to the Public

MEMORANDUM GC 10-04(CH)

UNITED STATES GOVERNMENT
National Labor Relations Board
Memorandum



DATE: April 20, 2010

TO: Ronald Meisburg, General Counsel
John E. Higgins, Jr., Deputy General Counsel

THRU: Richard A. Siegel, Associate General Counsel
Anne G. Purcell, Deputy Associate General Counsel

FROM: FY 2010 Quality Committee (Rosemary Pye, RD, R-1; Rochelle Kentov, RD, R-12; Joseph Barker, RD, R-13; Martha Kinard, RD, R-16; Karen Fernbach, RA, R-2; William A. Baudler, RA, Region 32; Paul Murphy, ARD, R-3; Leonard J. Perez, Deputy O-I-C, SR-33; Richard Wainstein, SA, R-4; James G. Paulsen, AGC, Ops-Mgmt.; Charles L. Posner, DAGC, Ops-Mgmt. and Dorothy D. Wilson, DAGC, Ops-Mgmt.)

SUBJECT: Quality Committee's Report on Common Casehandling Deficiencies
Uncovered in the FY 2009 Quality Review Process

High quality case processing continues to be a top priority of the General Counsel. The quality of field case processing is evaluated annually by the Division of Operations-Management, among other ways, through its review of selected case files for each Regional Office. The Quality Committee, a field committee created by the General Counsel, has reviewed and discussed common problems uncovered during the FY 2009 quality review process. A summary of those problems is attached. Although many involve a single incident, we nonetheless listed them to aid the Regions' training programs.

As in past years, the 2009 quality review process revealed that the Regions' case processing is consistently of high quality, an accomplishment for which all Regions should be justifiably proud. However, the quality review process also revealed a number of recurring problems identified in prior fiscal years. This report highlights the top ten ways to avoid common casehandling problems, as well as discussing a new concern uncovered by the FY 2009 quality reviews and some recommended solutions to avoid other issues.

The Committee's report on the results of the FY 2009 quality reviews is divided into five sections. First, there is a list of the top ten ways to avoid common casehandling problems. The Committee's report then outlines the following recommendations: 1) do not obtain attorney-client privileged information during an investigation or trial preparation; 2) emphasize the Board agent's role as investigator when taking affidavits;

and 3) ensure the timely and effective processing of compliance cases. Finally, the Report concludes with some suggestions for improving the communication of instructions and guidance from the General Counsel to Regional Offices through the intranet.

A. Top Ten Ways to Avoid Common Casehandling Problems

1. **Start Early, Set Deadlines, and Remain Curious.** Board agents, supervisors, and managers must start early, follow up quickly, and keep the pressure on the parties by setting reasonable deadlines to enable timely resolution of cases. This should occur throughout the life of a case, including the compliance stage. When investigating a case or processing a petition, do not stop asking questions, interviewing additional witnesses, or doing research that is necessary to make a well-informed determination about the case.
2. **Solicit Full Cooperation in Writing and Provide Adequate Response Time.** Always send a letter to the charged party providing an opportunity to respond to all allegations and advising that only Board agent affidavits constitute full cooperation. If you are late in seeking information from the charged party, do not attempt to compensate for the delay by giving the charged party inadequate time to respond.
3. **Avoid Cutting and Pasting.** When sending letters to any party, do not (1) reuse old letters, which often results in incorrect dates and salutations; or (2) cut and paste from affidavits, which often reveals too much information and potentially compromises the confidentiality assurances given to the affiant. Instead, use a [CATS template](#) and paraphrase or summarize the conduct that requires a response.
4. **Draft Well-Supported Decisional Documents.** FIRs must be accurate and fully supported by the evidence in the file. Agenda minutes must be the same and fully reflect the agenda discussion.
5. **Monitor and Timely Process Deferred Cases.** Have a system to ensure that deferred cases do not languish and are regularly monitored by a supervisor or manager. Deferred cases should be resolved at the earliest possible time.
6. **Track Advice Submission Requirements.** Keep up-to-date on issues that are required to be submitted to Advice.¹
7. **Obtain Required Approval for Settlements.** In cases in which merit has been found, ensure that settlements of less than 80 or more than 100 percent backpay (including interest) are submitted for Operations approval. See CHM [10592](#), [10130.2](#), and [11752](#). Regardless of whether there has been a merit determination, ensure that all settlements, including non-Board settlements, adhere to the GC's policy considerations about such matters as confidentiality, unduly harsh penalties for

¹ For a general outline of issues to be submitted to Advice, see [Memorandum GC 07-11](#). This memorandum is periodically updated, such as in [Memorandum GC 08-09](#).

breach of a non-Board agreement, and release of future rights. See [CHM 10140.1](#) and [OM Memorandum 07-27](#).

8. **Return Showing of Interest Documents.** The identity and number of card signers is sacrosanct in an R case file. By the close of the case, the file should not contain the showing of interest or any similar documents submitted by a petitioner or intervenor containing the names or the number of signers.
9. **Get Factual Stips and Avoid the EOT Misstatement.** Hearing Officers in pre-election hearings should always get a factual basis for all stipulations (see [Hearing Officers Guide on Procedural Matters](#)) and should *never* tell the parties that they do not have the authority to grant an extension of time to file briefs. See Rules and Regulations [Section 102.67\(a\)](#).
10. **Ensure the Official Paper File Is Complete.** Make sure that all files are complete by (1) documenting all relevant conversations with parties and witnesses; (2) placing in the file copies of all e-mails and other documents received electronically; and (3) promptly returning to the file any documents, such as original affidavits, complaints, election tallies or certifications, that were removed from the file for trial preparation or consideration in another case.

B. Do Not Obtain Attorney-Client Privileged Information During an Investigation or Trial Preparation

The quality review from last year disclosed that a Region had not recognized that attorney-client privileged information had been obtained during an investigation. This issue has arisen more frequently and has often required the creation of a “clean team” (a team composed of individuals who were not exposed to the privileged information) in a Region when such privileged material had been obtained and reviewed and in some cases used as a source of further evidence. Therefore, it is very important to train staff to recognize this important ethics issue.

Even if it is appropriate under the version of the ABA’s Model Rule 4.2 applicable in the appropriate jurisdiction (the “skip counsel” ethics rule) to communicate ex parte with a former supervisor/agent, or with a current supervisor/agent who is not a member of the organization’s control group, it is **never** appropriate to obtain attorney-client privileged information. A communication between an attorney and client is generally privileged if the following conditions apply: “(1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client’s instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection [is] waived.” *U.S. v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).

Even though the privilege is most often described as covering communications made from the client to the attorney, it also protects the communication in which the attorney provides the advice if the statements reveal, directly or indirectly, the substance

of a confidential communication by the client. If a witness wants to provide testimony about what was said at a meeting attended by an attorney, it is imperative before taking such testimony to first determine the primary purpose of the meeting and the attorney's role at the meeting. It must be determined whether an attorney just happened to be present at the meeting or whether the attorney was present to give legal advice. Also relevant is whether the meeting was confidential. Questions that can be used to obtain this background information and that do not implicate the privilege are found in Appendix A of the Attorney-Client Privilege Training Materials.

To ensure compliance with relevant ethics rules, a Board agent who is properly meeting ex parte with a witness who is a former or current supervisor/agent of a party should instruct the witness not to disclose any conversations s/he may have had with the party's attorney, or instructions that s/he received from the attorney either individually or at a management meeting.

Although there is a "crime-fraud exception" to the attorney-client privilege, the Board has declined to extend it to attorney instructions to commit an unfair labor practice. *Patrick Cudahy, Inc.*, 288 NLRB 968, 973-974 (1988). The crime-fraud exception may apply, however, if an attorney instructs an employee to give false testimony in an investigation or at a hearing. It is up to a tribunal to determine whether the crime-fraud exception can be invoked. Thus, a Board agent would have to make a prima-facie showing that the communications at issue were in furtherance of a crime or fraud, and receive a ruling permitting the potentially privileged testimony to be elicited from the witness.

Training material on Attorney-Client Privilege is available on the Enforcement Litigation page of Surfboard (click on the link to Ethics Material). It is strongly recommended that Special Ethics Counsel be contacted to obtain case-specific guidance in this area.

C. Emphasize the Board Agent's Role as Investigator When Taking Affidavits

One of the Board agent's most important roles is as an investigator, devoted to getting the facts as accurately as possible. This role begins with the investigation and continues through any settlement or trial of the case. Investigations lay the foundation for sound Regional determinations, effective settlement negotiations, successful litigation, or sustainable dismissals. As is often and correctly stated, the affidavit is the cornerstone of the investigation. Recent quality reviews show that there is room for improvement in the taking of affidavits.

To achieve that improvement, the Quality Committee recommends that the Board agent: (1) keep a running list of questions to ask each affiant; (2) begin by interviewing the witness to get an overview, establish rapport, and set priorities; (3) make the affidavit specific and concrete and fill in the gaps; (4) always provide context; (5) be proactive in gathering the evidence; (6) do not cut and paste; (7) leave time to proofread; and (8) take the lead in seeking additional witnesses.

1. Keep a Running List of Questions to Ask Each Affiant

Before starting affidavits, compose a list of potential questions by doing necessary research into the legal issues, checking for relevant information acquired in past cases and from previous witnesses in the current case, reviewing preliminary discussions with the parties, and reviewing preliminary position papers. Prepare questions to ask each witness, and, as the evidence develops, follow-up questions for particular witnesses. By keeping such an outline, Board agents can ensure that crucial questions will be asked and minimize the need to re-interview witnesses.

2. Begin by Interviewing the Witness to Get an Overview, Establish Rapport, and Set Priorities

Affidavits will be better if the Board agent begins by interviewing the witness to get a clear picture of the case. Each case is different. Get beyond old formulas and discover what the turning points are for this case. Take notes while guiding the witness through this overview and sketch a brief, informal outline to be sure the affidavit includes the essentials to determine if there is a violation. It is not necessary to obtain all of the details of the story before taking the affidavit. Instead, the development of an overview will allow the Board agent to delve into the details before beginning each section. Beginning with an overview provides important benefits:

- Board agents can establish a rapport with the affiant. As is well known, witnesses to Board cases may be intimidated or confused, and providing a sworn statement to a government official can be an unnerving experience. Taking the time to establish a rapport, answer questions, and provide honest assurances will help ensure a fuller and more accurate affidavit.
- Board agents will understand the strengths and weaknesses of the case and be able to set priorities in taking the evidence. Getting an overview identifies areas that need to be developed and those that can be handled in less detail. For example, if activity and knowledge are weak, more evidence establishing the fact or absence of these factors will be necessary than if activity and knowledge are strong. The Board agent, with knowledge of the full picture, will do a better job of recording the evidence in a manner that will aid analysis by including necessary explanatory information and excluding needless information.

3. Make the Affidavit Specific and Concrete and Fill in the Gaps

The quality reviews showed a number of instances where there were conclusionary statements or hearsay statements in affidavits. Some affidavits also neglected to fill in gaps necessary to make a determination in the case. These lapses can be avoided if the Board agent thinks concretely like a reporter. Always start by getting the who, what, where, and when of the story, and, as necessary, explain the why of

conduct or behavior. Walk the witness through the story, providing the next step or response or explaining the lack of such a step or response. Because the affidavit is likely to be the prime means of cross-examination if the case goes to trial, it is necessary for the Board agent to fill in the gaps. A few examples of the Board agent's critical assistance to the affiant may help:

- Avoid conclusionary statements. It is commonplace for the witness to provide a conclusionary statement, such as everyone understood that a certain person was pro-union, but the Board agent must probe to provide the reason for the understanding in concrete evidence, suitable for trial or sustainable on appeal.
- Distinguish between admissions and hearsay. It is important to distinguish between admissions and hearsay. Make this distinction by making it clear who the speakers are and describing their conversation in blow-by-blow fashion. For example, it is a significant admission if the affiant says, "The boss told me I was fired for my union activity." It is an important lead if the affiant says, "My fellow employee told me the boss told him I was fired for union activity." Do not blur the distinction between an admission and hearsay by putting in the affidavit the imprecise statement of fact, "The boss said I was fired for union activity." Such a statement is useless without attribution and follow up.
- Avoid gaps. The statements and conduct should make sense, or there should be an explanation. One example of a common gap occurs when a discriminatee fails to refute what he believes to be a pretextual reason for his discharge offered by the employer on the belief that it is obviously discriminatory and a protest would be futile. In such cases, the Board agent should note the absence of a response and provide the affiant's rationale.

4. Always Provide Context

Generally, an affiant is only thinking of his or her own experience. The Board agent can substantially improve the understanding of the case by asking questions to develop the context of those experiences. An employee's level of union activity may be strong or weak, depending on the activity of other employees in that campaign. Similarly, a request for information that gets a delayed response may be analyzed differently if the employer is usually very responsive or provides a good reason for the delay.

5. Be Proactive in Gathering the Evidence

Case analysis speaks in terms of burdens of proof. In the role of investigator, however, Board agents should get as much evidence as possible from each witness. Clearly, as the charging party's witnesses describe various company "supervisors," the Board agent will need to elicit facts that show whether or not they are supervisors as defined by the Act, rather than wait to obtain this information from the charged party.

Similarly, the reason for discharge in a *Wright Line* case should be fully explored with the charging party's witnesses.

6. Do Not Cut and Paste

Each affidavit must be individually prepared and represent that particular affiant's individual story. Think about the specifics of each case and witness. Cutting and pasting from other cases or witnesses, even on minor points, undermines the efforts to present the witnesses in their own voice or the case as unique.

7. Leave Time to Proofread

In the same way that the interview is critical before beginning the affidavit, proofreading is critical to finalizing it. If the Board agent allows for time to proofread the affidavit before presenting it to the witness, it is more likely that the above guidelines will be met. Proofreading with a critical eye will catch any problems in providing an overview and guidance throughout; detail, context, and full blow-by-blow descriptions; and a comprehensive picture. The affidavit also should be subjected to a more traditional proofreading with an eye to correcting typos, whether omissions or inadvertent inclusions of words that alter meaning, or misspellings, and for technical issues such as ensuring the inclusion of the case number on the affidavit and the appropriate jurat reflecting the setting in which the affidavit was taken, and, of course, ultimately the signature of the Board agent. After the often difficult process of giving an affidavit, the affiant is usually tired or rushed. Consequently, affiants are rarely adequate proofreaders. They depend on the Board agent, the trusted government official, to do the job.

8. Take the Lead in Seeking Additional Witnesses

In addition to being aggressive in securing evidence on all facets of the investigation rather than merely relying on burdens of proof, the Board agent should be aggressive in contacting witnesses. It is never acceptable to say the charging party did not present necessary witnesses. While it is appropriate to solicit the charging party's assistance in contacting and presenting witnesses, the charging party may not be able to convince other witnesses to cooperate or may not be able to identify them sufficiently. Nor does the charging party have the persuasiveness in securing cooperation that the Board agent as a neutral representative of the federal government has. There also may be important neutral witnesses who are not in the control of the charging party. It is always the responsibility of the Board agent to identify necessary witnesses, particularly corroborative and neutral witnesses, and to contact them to secure their cooperation.

D. Ensure the Timely and Effective Processing of Compliance Cases

Timely and effective compliance remains a high priority of the General Counsel, and the need to move forward quickly is especially urgent in cases where the Region has been successful in obtaining a Board order. Notwithstanding that goal, the FY 2009

quality review process revealed instances in which Regions failed to initiate compliance proceedings until as much as 4 months after the issuance of a Board order. Such delays in initiating compliance proceedings and the consequent delays in collecting on any make-whole remedy are unacceptable. They are a disservice to the parties, as well as to any employees who may stand to benefit from a Board remedy, and they have the potential of exposing the Board to rebuke by the courts.²

[Section 10506.8 of the Compliance Casehandling Manual](#) instructs the Regions to “initiate compliance actions with the remedial provision of the Board’s order as soon as it issues”(emphasis added). Moreover, Memorandum [OM 08-47](#) reaffirmed the General Counsel’s commitment that “when the Region has prevailed in litigation and there is a formal compliance case, that case should receive top priority to provide the hard-won remedy expeditiously.” Thus, a Region should review a Board order promptly upon its receipt and, upon determining at that time what affirmative obligation it imposes on the respondent, notify the respondent forthwith regarding the steps it must take to achieve compliance with the affirmative obligations of the Board’s order, giving the respondent a firm deadline for fulfilling those obligations. If the respondent is dilatory in complying with the Board’s order, enforcement proceedings should be considered.

Further guidance in the prompt handling of compliance matters is set forth in the Quality Committee’s Report on Common Casehandling Deficiencies Uncovered in the FY 2007 Quality Review Process, dated May 15, 2008 (Memorandum [GC 08-06](#)), which makes the following recommendations for improving the expeditious handling of compliance cases: “A. Increase the number of people expert in compliance work; B. Delegate some of the work now performed by compliance staff members to other members of the staff; and C. Take advantage of improved methods and procedures for performing compliance work.”

Another compliance-related problem uncovered in the FY 2009 quality review process is that some Regions are preparing closed case reports which, contrary to the requirements set forth in [OM 06-52](#), show that the backpay amounts owed were identical to the amounts paid, even though the files reflected that the backpay recipients received less than 100% of the backpay and interest owed. The proper procedure, as set forth in [OM 06-52](#), is that when the amount of backpay and interest collected is less than the amount of a complete make-whole remedy, the closed case report should not set forth identical figures for the amounts owed and the amounts actually paid but should, instead, accurately reflect the two separate amounts.

E. Suggestions for Improving the Communications of Instructions and Guidance from the General Counsel to the Regions

² As noted in [OM 08-47](#), the United States Court of Appeals for the First Circuit criticized the Board in *NLRB v. Harding Glass*, 500 3d 1 (2007), for its lengthy delays in pursuing compliance in that case, which, as the court observed, imposed an undue hardship on the parties, thus prompting the court to direct the Board to submit a memorandum outlining the steps it was taking to expedite compliance case processing.

To ensure high quality and consistency throughout the country, Regions must be aware of, and follow, current instructions and guidance from the General Counsel. New technology, in the form of the Agency's intranet, offers the opportunity to more effectively communicate such information. Headquarters instructions are now readily available through the intranet to Regional staff on their computers in the office, and in the field on Agency laptops (through Aventail-assisted access to their office computer desktops). Rather than have to depend entirely on each Regional Office to compile or remember all the relevant memoranda, e-mails and other communications from Headquarters, these instructions and guidance, in their most current and updated form, will be posted on the intranet for immediate access.

In order to improve the intranet's usefulness, the Committee recommended and the General Counsel has approved the following recommendations to facilitate access to instructions and guidance:

- create and maintain indexed or subject-based compilations of hyperlinks to the multitude of OM and GC memoranda, so that relevant instructions are easier to locate;
- create and maintain cumulative "living lists" of particular kinds of instructions, such as those concerning coordinated cases or mandatory Advice issues, so that Regions can easily access a current and complete list;
- maximize the use of hyperlinks and bookmarks and make documents readily "searchable" to permit more efficient review of intranet materials;
- show document dates on each document or each page to assure readers that on-line materials are up-to-date; and
- assign high priority to intranet maintenance to ensure that the intranet's contents are current, fully usable, and well organized.

Conclusion

The Committee hopes this report will assist in fostering high quality case processing in the field. The Committee's recommendations will be incorporated into its [Comprehensive Report on Quality Casehandling](#), the compilation of the Committee's guidance since 2004 that is posted on the Operations page of Surfboard. The Committee also recommends that this memorandum be the subject of a professional training session in all Regional Offices.

Attachment - Summary of the FY 2009 Quality Reviews

ATTACHMENT
SUMMARY OF FY 2009 QUALITY REVIEWS

A. UNFAIR LABOR PRACTICE CASES

Affidavit Problems, Lack Of Corroboration and Scope of Investigation

- ✓ Initial and supplemental affidavits failed to outline conversations at meetings at which it was alleged that the employer failed to allow proper union representation.
- ✓ Board agent failed to follow-up with a corroborative witness who was allegedly present when the employer informed employees that the union was to blame for wage decreases and solicited employees to resign from the union.
- ✓ Board agent failed to seek evidence of disparate treatment when taking the affidavit of the employer's division manager and further failed to seek rebuttal evidence until directed to do so at an agenda meeting.
- ✓ In one case, the Board-prepared affidavits of two witnesses were identical in substantial part and the affidavit of a third witness contained language that was identical to the other two affidavits.
- ✓ In another case there was no attempt to obtain an affidavit from an apparently cooperative employee who had relevant evidence regarding an alleged unlawful discharge.
- ✓ The supplemental affidavit of the charging party did not contain any Section 2(11) facts regarding a potential supervisor, who allegedly heard the charging party talk about the union.
- ✓ The affidavit about the charging party's union activity did not set forth the details surrounding critical conversations.
- ✓ The affidavit of the employer's agent did not discuss whether the alleged misconduct by the employee had been investigated by the employer or if the employee had been advised that such conduct was unacceptable.
- ✓ Board agents accepted parties' positions uncritically and did not follow up on obvious leads.
- ✓ Board agent did not contact other possible witnesses who could have shed light on the issue of the company's knowledge of the charging party's union activity.
- ✓ In a charge filed against a union, while the investigation established that union organizers had not made threats, agent did not consider whether the rank-and-file employees who had made threats were agents of the union.
- ✓ The affidavit taken from the charging party provided no context for an allegedly coercive telephone call.

Problems in Agenda Minutes and FIRs

- ✓ FIR described information not contained in the case file, including commerce information, information obtained from interviews with employer witnesses and other issues in dispute in the charge.

- ✓ FIR failed to correctly set out the issues in the case, and contained an inadequate analysis of the facts and the relevant legal theories at issue in the case.
- ✓ FIR failed to discuss employer president's apparent acknowledgement that the company would not sign a contract until parties settled arbitration.
- ✓ Minute contained only cursory Wright Line analysis.

Docket Problems

- ✓ The Region's docket letters failed to advise parties with limited English proficiency of the Agency's assistance available to them as directed by OM Memorandum 03-69.

Timeliness of Investigation and Unreasonable Deadlines

- ✓ EAJA letter set forth an unreasonable deadline for the submission of the charged party's evidence.
- ✓ In a Category 3 case, no affidavit was taken until a month after the charge was filed.
- ✓ In a Category 2 case, no affidavit was completed until more than 2 months after the charge had been filed.
- ✓ Agent waited for charging party to submit evidence instead of initiating arrangements for receipt of evidence from that party.
- ✓ EAJA letter did not issue until one month after the charging party's evidence was obtained.
- ✓ There was a 2 and ½ month delay between the filing of the charge and the taking of a lead affidavit in a Category 3 case.
- ✓ Board agent delayed seeking the charged party's evidence until 3 weeks after the charging party's evidence was obtained.
- ✓ Board agent failed to obtain affidavits from the charging party's witnesses without explanation despite the fact that the case had been under investigation for 2 months.

EAJA Letters

- ✓ Contrary to the requirements of OM 06-05, EAJA letters to the charged party failed to outline the allegations of the charge, the evidence needed, or the witnesses to be presented for affidavits. (3 Regions)
- ✓ EAJA letter prematurely issued to the charged party before the lead affidavit was taken. Accordingly, not all issues were fleshed out when the EAJA letter was sent.
- ✓ Several files contained no EAJA letters despite a prima facie showing of a violation.
- ✓ Contrary to CHM 10054.5, in a number of cases, the files did not reflect Board agent requests for affidavits and did not state, other than in the docketing letter, that failure to provide affidavits constituted less than full cooperation.

- ✓ EAJA letter to a union in DFR case improperly identified two potentially neutral employee witnesses and asked the union to make them available for interviews with agent.
- ✓ In a number of cases, EAJA letters did not explain what constitutes full cooperation.
- ✓ Several EAJA letters contained details that should not have been disclosed to the charged party.

***Collyer* Follow-Up and Related Issues**

- ✓ Regions had a number of *Collyer* cases in which there was a substantial lapse between the dates that the Region requested an update on the status of the grievance and any action was taken on the cases, i.e., 5 and ½ months passed with no action taken after requesting an update, 6 months passed after being told by the employer that there was a tentative settlement, and several months passed in 2 cases without any follow-up when charging party failed to respond to a deferral update letter. In another case there was a delay of 5 weeks after the Region learned the grievance had been denied by a grievance panel before the Region took action and a delay of 3 months between receipt of the transcript and a recommendation to dismiss the charge. In another case the first check occurred 6 months after the case was deferred and thereafter no additional check occurred for 9 months (4 Regions)
- ✓ In one deferred case, the Region did not send an initial follow-up letter for 8 months. At that time, the employer advised the Region that the grievance was no longer viable because the charging party had failed to appear at grievance meetings. The Region failed to conduct any additional follow-up for 3 months, at which time the employer reiterated that the grievance was closed. There was no further follow-up by the Region for an additional 3 months after that.
- ✓ In another Region, even though the Region was informed that the grievance had been resolved in a timely fashion, the Region did not act promptly to solicit the withdrawal and close the case.
- ✓ Region delayed in processing a withdrawal after receiving information that grievance had settled and a signed withdrawal request was received.
- ✓ Region did not conduct the initial follow-up check for 8 months.
- ✓ In several deferred cases, there were substantial periods of time between status checks.

Case Processing Issues

- ✓ In a charge filed against the union, the Board agent obtained an affidavit from the discriminatee's father, a former union representative, which contained references to privileged attorney-client discussions. This ethics issue was not caught until the case was reviewed by the trial attorney during pre-trial preparation.
- ✓ The charged party union provided contact information for ten witnesses who apparently had relevant information, but there was no documentation in the

file showing that there was any attempt to contact the witnesses or any justification for not doing so.

- ✓ The review disclosed that the Region was routinely sending many documents by certified mail that should be sent by regular mail, contrary to OM Memorandum 05-26.
- ✓ The file in one case did not establish that the charging party was given the opportunity to withdraw the charge prior to the short-form dismissal letter issuing.
- ✓ Phone affidavit taken in Cat. 2 case without file documentation of reason.
- ✓ Board agent provided company attorney less than 24 hours to settle before Region issued complaint, sent the company a notice for the wrong case and failed to convey back pay amounts due to attorney.

File Documentation Issues

- ✓ In a Category 3 case, file contained only an unsigned affidavit from the charging party, without an explanation for why the affidavit was unsigned. In another case, the affidavit of the charged party's administrator was unsigned without an explanation. (2 Regions)
- ✓ Case files failed to contain any file notes regarding internal discussions regarding the appropriateness of communicating with a supervisor/manager before an affidavit was taken from a former supervisor/manager of the charged party. (2 Regions)
- ✓ The file failed to contain file notes documenting communications with the charging party and the charged party.
- ✓ Several *Collyer* deferral files failed to contain copies of the relevant collective-bargaining agreements or the contract provisions at issue.
- ✓ Several files failed to include information from alleged discriminatees concerning interim earnings and search for work. (See Casehandling Manual Section 10054.2(b)).
- ✓ In a Category 3 case, the file contained no explanation as to the reason evidence from third-party witnesses was memorialized in telephone affidavits, rather than face-to-face affidavits.
- ✓ In Category 3 case, the file did not reflect discussion with supervision about taking telephone affidavits.
- ✓ In two cases the files did not contain notes of conversations with parties' representatives regarding significant events such as plans to amend the complaint at trial and discussions about the status and processing of a deferred case.
- ✓ Three cases in one Region should have had better file notes. In one case, the file notes from the initial investigation were missing, and the jurat on an affidavit was not correctly dated. In another case, there were no notes in the file reflecting case processing activities prior to the deferral of the charge, and in a third case the file notes were incomplete.
- ✓ Files lacked key components such as affidavits, FIRs and/or minutes.
- ✓ File did not contain copy of the draft affidavit sent to affiant and no signed copy of the affidavit was returned.

Settlement Agreement Issues

- ✓ Contrary to Section 11752 of the Casehandling Manual, the Region approved a non-Board settlement, in a case in which complaint was authorized, that provided for 60% of the backpay due to two discriminatees without seeking clearance from Operations to approve the withdrawal request.
- ✓ One non-Board settlement approved by the Region without comment included a confidentiality clause that required the discriminatee to keep all terms of the Agreement “strictly confidential.” See OM Memorandum 07-27.
- ✓ While the Region secured a copy of the non-board settlement agreement between the employer and the charging party, the file does not contain an explanation of how the charging party’s backpay was calculated.
- ✓ Case file lacked documentation as to whether Region reviewed terms of non-Board adjustment to ensure terms complied with Agency policies.

CATS Issues

- ✓ Region’s CATS data showed numerous data entry mistakes, even though this problem had been the subject of last year’s quality review.
- ✓ The Notes section of CATS failed to contain more detail on cases that are out of the ordinary or contain unusual circumstances that needed to be documented.
- ✓ Three charges that were IO assisted did not have the IO contact information entered in CATS and/or did not show they were IO assisted.
- ✓ In several cases when the Region notified the charged party of 10(j) potential there was no CATS data entry of this notification.
- ✓ CATS data for case did not note that it was a potential 10(j) case even though the Region treated it in that fashion.
- ✓ CATS data failed to capture the Region’s decisions on whether to seek 10(j) authorization in cases in which the Region seriously considered the need for 10(j) relief.
- ✓ CATS data did not cover determinations for several of the charge allegations.

B. 10(j) CASES

Obtaining Just and Proper Evidence

- ✓ The Region failed to investigate report of employee reluctance to attend union meetings because of employer statements.
- ✓ In nip-in-the bud case, agent did not contact union to learn about the alleged discriminatee’s role in organizing effort or to determine effect of discharge on organizing effort.

Failure to Consider Need for 10(j) Relief in Appropriate Cases

- ✓ In several cases, the Region failed to identify the potential for a Section 10(j) injunction. In one case, the Region did not conduct a 10(j) investigation until after issuance of complaint alleging unlawful statements and one unlawful discharge although the Board agent had been told by a union agent that employees were afraid to attend meetings due to Employer statements. Moreover, the memorandum to Advice recommending against seeking an injunction did not mention this information.
- ✓ 10(j) discussion did not include the in-depth analysis warranted in the case.

C. REPRESENTATION CASES

Case Processing Issues

- ✓ The Region dismissed a representation petition based on contract bar without explaining to the petitioner the basis for dismissal and providing the petitioner an opportunity to challenge the evidence or make any legal arguments.
- ✓ In one representation case in which the Region issued a Decision and Direction of Election, the Region failed to give notice to or include a party-in-interest (the temp agency) in circumstances where this would have been appropriate.
- ✓ In one representation case, after the Region issued a report on objections and challenges and during the time for filing exceptions with the Board, the Petitioner withdrew its objections and the challenge. The Region approved the withdrawal, and opened and counted the remaining ballot without notifying the Executive Secretary. The Board then issued an order adopting the Director's findings after the Region certified the results of the election. The processing of a related unfair labor practice case alleging the discharge of one of the challenged voters to be a violation of 8(a)(3) which had been held in abeyance pending the R case was not promptly resolved, and the resolution of the unfair labor practice case was also delayed for 3 months.

Proper Role of Hearing Officer

- ✓ Hearing Officer admitted documents and other records into evidence without first eliciting the proper foundation to support the introduction of such records.
- ✓ Contrary to Section 11244.2 of the Casehandling Manual, the Hearing Officer informed the parties that he did not have the discretion to grant an extension of time for filing of post-hearing briefs.
- ✓ The Hearing Officer permitted one witness to be called to answer irrelevant questions and on several occasions permitted irrelevant questions to be posed to other witnesses unduly prolonging the hearing.
- ✓ Hearing Officer should not have strictly applied rules of evidence in pre-election hearing.

Showing of Interest Issues

- ✓ Six representation case files reviewed failed to contain any letters returning the authorization cards or showing of interest to the petitioner. (2 Regions)
- ✓ Two of the Region's closed representation case files still contained the showing of interest.
- ✓ In one closed case, the file contained a list of card signers, apparently created by the Region, and in another case the number of authorization cards submitted to the Region was set forth in the I.O. note, which was in the case file.

File Documentation Issues

- ✓ Regions' representation case files failed to contain certain critical documents, including contact logs, notes documenting the attempts to narrow issues, certifications, tally of ballots, documentation concerning a decision to proceed to an election despite the employer's pending request for review, documentation about the 5-month gap between the holding of an election and the issuance of a tally of ballots, and a casehandling E-mail granting permission to self-certify an election.
(2 Regions)

D. COMPLIANCE CASES

File Documentation Problems

- ✓ The Region's compliance file was missing documentation showing the Region's ongoing efforts to obtain full compliance with a Circuit court judgment in a time-sensitive, test of certification 8(a)(5) case.

Closed Case Report

- ✓ Contrary to the requirements set forth in OM 06-52, two closed case reports showed that discriminatees were receiving the full amount of backpay and interest owed, even though a file memo showed that discriminatees were, in fact, receiving significantly less than 100% of the backpay and interest that was owed.
- ✓ In three cases in one region, the closed case reports indicated, contrary to OM Memorandum 06-52, that the amounts owed were identical to the amounts paid, even though the calculations in the file showed the discriminatees received less than 100% of the backpay and interest owed.

Case Processing Issues

- ✓ A Region's letter seeking compliance with a court judgment threatened the respondent that it would seek enforcement, rather than contempt, if respondent failed to take the required actions outlined in the court judgment.
- ✓ The Region's compliance file failed to explain a 4-month delay in initiating compliance proceedings after the issuance of the initial Board order.
- ✓ In one case there was an unexplained 4-month delay in initiating compliance proceedings after the initial Board order.

- ✓ Region's computation of backpay for 8-month period did not follow the standard practice of quarterly computation.